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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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Federal Communications Commission
Office of Secretary

RM-8897

In re Applications of:)
)
Cellular Communications of Puerto)
Rico Petition for Declaratory)
Ruling or Rulemaking to Determine)
Whether Competitive Bidding)
Procedures Should be Used to)
License Certain Cellular Rural)
Service Areas)

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To: The Commission

COMMENTS OF PRICE COMMUNICATIONS CELLULAR INC.
IN RESPONSE TO PUBLIC NOTICE

Price Communications Cellular Inc. ("PCCI"), by its counsel, hereby comments on the petition for declaratory ruling, or in the alternative, for rulemaking filed on September 9, 1996, by Cellular Communications of Puerto Rico, Inc. ("CCPR"). By Public Notice dated October 24, 1996 (DA 96-1685), the Commission invited public comment on CCPR's petition.

PCCI, under its former corporate name, filed applications for each of the Rural Service Area ("RSA") markets for which the Commission accepted applications. At the time, PCCI owned no cellular assets. Nevertheless, PCCI filed its applications in good faith and with the intent to construct cellular systems in each market for which it applied.

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PCCI was the successful lottery winner in three of the RSA markets -- Utah 1 - Box Elder RSA, South Dakota 7 - Sully RSA, and Louisiana 8 - St. James. In two of those three markets, PCCI constructed and commenced operations of cellular systems on its own. In the third market, PCCI assigned its construction permit in exchange for minority interests in four larger Metropolitan Statistical Area ("MSA") markets that were of equivalent market value.

The experience gained by PCCI in constructing and operating two cellular markets and through participation as a minority owner of four additional MSA markets was invaluable in its efforts to become an active participant in the wireless industry and to provide quality cellular service to subscribers.

PCCI, through wholly-owned subsidiaries, operated the South Dakota 7 RSA system for two years before selling the system. Similarly, it operated the Louisiana 8 RSA system for over two years before exchanging it for a system in the Abilene MSA. Far from reaping a windfall, however, PCCI has consistently used profits it realized to reinvest in the cellular industry.

Following a corporate reorganization, the operating PCCI systems became part of a new company called PriCellular Corporation ("PriCellular"). Since that time, PriCellular has grown the assets initially obtained in the RSA lotteries into a public company that is a major independent competitor in the cellular telephone industry. PriCellular now owns and operates more than 20 cellular

telephone systems in MSAs and RSAs in nine states and holds minority ownership interests in a number of additional markets.

Although PCCI now has access to funds that would enable it to be one of the few formidable competitors in auctions to be held for RSA markets, whereas it is would only be one of hundreds with an equal chance to win any given RSA lottery, PCCI believes that lotteries are the only appropriate mechanism for the remaining RSA markets where no license has been awarded because the initial lottery winner has been disqualified.

As an initial matter, PCCI believes that most lottery applicants were sincere in their intention to construct and operate systems. Second, such applicants are entitled to rely upon the rules for comparative selection that were in place at the time they filed their applications. The Commission properly determined in 1994 that such "grandfathered" applicants had rights that Congress had recognized and that should be respected by the Commission. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Memorandum Opinion and Order, PP Docket No. 93-253, 9 FCC Rcd 7387 (1994). Third, the Commission should not rely on subsequent developments to justify a change in the rules.

Remaining lottery applicants cannot be faulted for, or have their rights reneged based upon, the fact that it has taken eight years or more to process the remaining unlicensed RSA markets. In its determination how best to serve the public interest, the Commission has had ample opportunity to establish the pace at which

decisions were made with respect to the qualifications of the original lottery winners for the remaining markets and when follow-up lotteries would be held to establish a new tentative selectee. In that regard, the Commission took more than two years from the May 1994 decision cited above for the Commission to issue the straightforward public notice announcing new lotteries. See Public Notice (FCC to Hold Domestic Public Cellular Telecommunications Service Lottery for RSA Markets in Which Previous Winner was Defective, Mimeo No. 63896 (July 12, 1996).

It would also be inappropriate for the Commission to change the rules affecting the remaining RSA markets midstream because some applicants chose to assign their construction permits for a profit rather than to construct cellular systems. To do so would be to assess fault to lottery applicants where none is warranted. Such sales were authorized and clearly contemplated by the Commission when it chose to permit the sale of unbuilt cellular construction permits in Bill Welch, 3 FCC Rcd 6502, 65 RR 2d 755 (1988). Welch marked a significant departure from previous interpretations of the Communications Act prohibiting for-profit sales of bare construction permits. See Sewell, Stephen F., Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934, 43 Federal Communications Law Journal 277, 328-330 (1991). The Commission cannot properly fault the remaining lottery applicants because lottery winners sold systems as specifically permitted and contemplated by the Commission's own Welch decision.

The Commission's Rules in effect when PCCI and the other RSA applicants filed their application required the Commission to use lotteries to award cellular construction permits. They also provided for procedures to assess the qualifications of the lottery winners and for awarding the permits anew where such winners did not hold the requisite qualifications to hold a Commission license. When those applications were filed, nothing informed the applicants that the Commission would substitute auctions as the means for selecting licensees for the RSA markets. It would be manifestly unfair for the Commission now to frustrate the applicants' legitimate expectations by changing the ground rules upon which they filed their applications. Moreover, changing the procedures to require the use of an auction would constitute impermissible retroactive rulemaking. See, e.g., Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1554-1555 (D.C. Cir. 1987), citing SEC v. Chenery Corp., 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed.

Finally, the remaining lottery applicants filed their applications at a time when the prospects for the cellular industry were far less certain than they are today and when the barriers for entry were far lower. To require such applicants to compete in an auction eight years later would unfairly raise the barriers to entry even further for the entrepreneurs who had the foresight to seek to participate in a nascent industry. Those entrepreneurs now have the right to have their applications treated in accordance with the rules in effect at the time they filed their applications.

At the very least, the Commission should rule that the remaining lottery applicants have cut-off status that must be respected in determining which applicants are eligible to participate in any selection process. See, e.g., McElroy Electronics V. FCC, 86 F.3d 248 (D.C. Cir. 1996). The applications of the remaining lottery applicants have not been dismissed by final order and the Commission has no authority at this time to dismiss the applicants. Accordingly, any auctions held for these markets may not include new applicants.

Respectfully submitted,

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November 25, 1996

CERTIFICATE OF SERVICE

I, Lawrence Roberts, an attorney in the law firm of Roberts & Eckard, P.C., do hereby certify that a copy of the foregoing "Comments of Price Communications Cellular Inc. in Response to Public Notice" has been sent by first-class mail, postage prepaid, this 25th day of November, 1996, to the following:

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